

Date: 04/02/2012

Committee: House Education

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: HCR 188 / HR 145 House Concurrent Resolution; Public Schools

Purpose of Bill: Requesting the Board of Education to review its by-laws and policies, applicable administrative rules and statutes, as well as any internal practices and procedures, to provide the best possible legal protection for public school teachers and administrators who have concerns about re-admitting certain students to the classroom following any disciplinary action of the student for abuse or possession of alcohol or drugs.

Department's Position:

The Department of Education opposes this Resolution based on the following concerns:

- (1) Current statutory law, administrative rules, Board policies and procedures already address classroom safety and provide sufficient avenues for staff to voice concerns and take affirmative steps to promote or secure a safe learning environment;
- (2) Barring a student from readmission to class based solely on an asserted "heightened risk" as a result of a prior, completed, discipline for drug abuse, in the absence of specific, concrete, and immediate evidence might expose the Department to due process challenges;
- (3) Conforming internal Department procedures and policies to indemnify teachers and administrator under the circumstances described in the Resolution might exceed the legal authority of the Department, in the absence of express statutory authority to undertake an indemnification obligation.

The Department currently has in place an overlapping and reinforcing network of statutes, administrative rules, Board policies and practices, and collectively bargained agreements that promote safe environment and class room security. A non-exhaustive list of documents demonstrating the Department's commitment to a safe environment include the following:

- HRS § 302A-1134 allowing the principal with the approval of the complex area superintendent to exclude a student from school, subject to rights of the student to appeal the exclusion.
- HRS § 302A-1002 mandating reporting of an act that "has been committed or will be committed" which occurs on school property and involves crimes related to arson, assault, dangerous weapons, dangerous drugs, harassment, criminal property damage, terroristic threatening, among other behavior.
- HRS § 302A-1003 authorizing the State to "indemnify and hold harmless anyone participating in good faith in making a report [under section 302A-1002] from any civil liability that might otherwise

be incurred or imposed by, or as a result of, the making of the report.

- Hawaii Administrative Rules, Title 8, Chapter 19 regarding Student Misconduct, Discipline, and Reporting Offenses, among other topics. Included in "Chapter 19" is a policy statement that the purpose of school-administered discipline is to promote and maintain a safe and secure educational environment." HAR § 8-19-c(1). Chapter 19 also provides that a principal in an emergency may "crises remove a student immediately based upon preliminary inquiry and findings that the student's conduct presents a clear immediate threat to the physical safety of self or others or is so extremely disruptive as to make the student's immediate removal necessary to preserve the right of other students to pursue an education free from undue disruption." HAR §8-19-7 Crises Removal. Chapter 19 also establishes due process procedures for suspensions exceeding ten days. See HAR § 8-19-9. With respect to the intent of this Resolution in particular, Chapter 19 also establishes a procedure by which "any teacher, official, or other employee . . . who is a witness to a class A or class B offense [as defined in Chapter 19] . . . shall promptly report the incident to the principal or designee." In addition HAR §8-19-20 mirrors the statutory authority to provide indemnity upon reporting a class A and class B offense.
- Board Policy 4200 Student Safety and Welfare, states in pertinent part, that the "Department of Education shall provide a caring environment conducive to the physical, mental, social, and emotional well-being of students while they are participating in school activities.
- Board Policy 4201 Use of Force, outlines the circumstances where an administrator or teacher may, within the scope of that person's employment "use and apply such amount of force as is reasonable and necessary to . . . restrain a student from an act of wrongdoing . . . to quell a disturbance threatening physical injury to self or other . . . for the protection of self, others or public property.
- These policies and practices relating to school safety are communicated each year to all teachers as part of the "Opening of the School Year Packet." For example, the Opening of School Year Packet for School year 2011-2012 outlines the following "duties and responsibilities" of teachers relating to student behavior and discipline: "Confer with principal and recommend, if appropriate, exclusion of a student from class when the student's classroom behavior is persistently disruptive and detrimental to the discipline and morale for the entire group." The teacher must "provide the principal with documented data about the condition(s) leading to the recommendation for exclusion." See Guidelines on Duties and Responsibilities 2011-2012 SY paragraph 9.
- The HSTA collective bargaining contract, Article X Teacher Protection (at pages 42 and 43) is relevant to this Resolution. "When any teacher believes that an unsafe or hazardous condition exists, the teacher shall immediately inform the principal or other immediate supervisor who shall take appropriate action. Within a reasonable length of time, the principal or designee will inform the teacher of the action which has been taken." (B, at 43).

The Department's overarching mission is to provide public education. Given the compulsory nature of school attendance, any Department action that restricts the opportunity of a student to obtain an education--such as barring a student from readmission to class following completion of suspension for drug violations as contemplated by this Resolution--must be balanced against the privilege of education and carefully tailored to be proportionate to benefit to be achieved by the restriction. Due process principles in the meting out or extending discipline must be observed. As the foregoing examples of Department policy and practice illustrate, discipline or proactive safety actions are based on specific evidence of the harm or threat. The discipline is also time-bound. The student is provided opportunity to understand and challenge the discipline.

The Resolution as currently drafted, however, is overbroad and may implicate due process concerns. The Resolution appears to presume that all students who have been disciplined for abuse or possession of drugs or alcohol necessarily "pose a heightened risk" to classroom safety. Based solely on the "status" as a disciplined student, (and absent specific behavior or evidence of immediate and potential harm) there

seems to be an implied presumption against readmission to class.

The bar on readmission would apply for any "classroom where certain types of tools or equipment capable of causing serious physical injury are readily available. This scope would include, for example, shop class where power tools are used, but would also include chemistry labs using dangerous chemicals or cooking classes using knives. Because under this Resolution, the presumption of a bar on readmission is based solely on status as a former disciplined student, it would be difficult to determine how long the bar remain in place. For example, would a student suspended for one week at the beginning of the semester forfeit readmission for the entire semester upon return? Would a student suspended at the end of 10th grade be barred from readmission for certain classes in the 11th grade?

We wish to emphasize that the Department staff is empowered to take affirmative proportionate steps to secure the safety of the classrooms, including the use of reasonable force or "crises removal", where there is a clear, immediate risk. These measures will be taken regardless of the status as a past-disciplined student, e.g., if a student appears obviously drunk and a threat to himself/herself or others if allowed in a chemistry lab, appropriate restraint or exclusion from the class can be exercised even if there has been no former suspension.

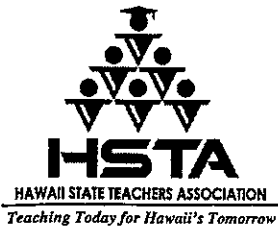
This Resolution requests the Department to "make any necessary changes to its by-laws and policies, applicable administrative rules, or internal practices and procedures, in order to be consistent with **indemnifying and holding teachers and administrators harmless** for any incidents arising out of the readmission of such students [students who have been suspended or disciplined for abuse or possession of alcohol or drugs] to the classroom over the teacher's and/or school administration's objections(s)." (bold faced added for emphasis).

It is our general experience that indemnification and hold harmless obligations cannot be undertaken by a state agency such as the Department of Education unless there has been an express and explicit statute granting the authority to undertake an indemnification obligation. See, for example, HRS § 29-15.5 Indemnification of federal agencies; HRS § 46-71.5 Indemnification of county agencies; HRS § 302A-1003 Indemnity upon reporting crime [on school property.] Generally, where there has been an express statutory grant of authority to undertake an indemnification, there are also statutorily prescribed safeguards that must be strictly followed in order for the indemnity to be valid. These safeguards include review and approval by the Governor and the State Comptroller.

Although this Resolution expresses the sentiment that "Hawaii's public school teachers and administrators further deserve to be indemnified and held harmless for any incidents arising out of the readmission of such students to the classroom over the teacher's and/or school administration's objections(s)," this Resolution does not have the force or effect of law.

It is thus not clear whether the Department can validly conform its policies, administrative rules, and practices to provide an indemnification where there is no clear statutory authority to do so.

We wish to defer to the Attorney General for guidance on this issue.



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TESTIMONY BEFORE THE HOUSE COMMITTEE ON EDUCATION

RE: HCR 188/HR 45 - REQUESTING THE BOARD OF EDUCATION TO REVIEW ITS BY-LAWS AND POLICIES, APPLICABLE ADMINISTRATIVE RULES AND STATUTES, AS WELL AS ANY INTERNAL PRACTICES AND PROCEDURES, TO PROVIDE THE BEST POSSIBLE LEGAL PROTECTION FOR PUBLIC SCHOOL TEACHERS AND ADMINISTRATORS WHO HAVE CONCERNS ABOUT RE-ADMITTING CERTAIN STUDENTS TO THE CLASSROOM FOLLOWING ANY DISCIPLINARY ACTION OF THE STUDENT FOR ABUSE OR POSSESSION OF ALCOHOL OR DRUGS.

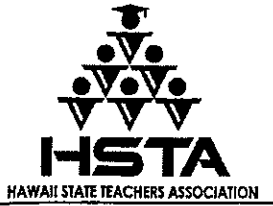
April 2, 2012

WIL OKABE, PRESIDENT
HAWAII STATE TEACHERS ASSOCIATION

Chair Takumi and Members of the Committees:

The Hawaii State Teachers Association supports HCR 188 and HR 145.

Teachers are also subjected to bullying by students. While they do their best not to let aggressive student behavior disrupt their classrooms or detract from their professional duties, teachers are rightfully concerned about the safety of themselves and their colleagues when a student is re-admitted to class after a violent or emotionally charged outburst, particularly if the student is found to have been under the influence of drugs or alcohol.



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Substance abuse is not the only, or even primary, cause of student driven threats against teachers and school personnel. Parental involvement, economic troubles, psychosocial development, and other difficulties may drive unacceptable behavior. Therefore, we encourage your committee to broaden the scope of this resolution to include all potential forms of abuse including physical force, as it relates to the reintegration of potentially dangerous students into a normal school setting.

Currently, Article XI of the HSTA-BOE master agreement mandates that teachers be notified in writing of the conditions under which re-admittance of a disruptive student is granted, including a “safety plan” for dealing with future incidents. Since the master agreement draws no distinction between drug-related offenses and other offenses in terms of teacher safety, we urge your committee to refrain from codifying these distinctions into resolutions relating to the same topic.

In order to implement our requested change, we suggest amending this resolution to direct a policy review of the legal protocols relating to the re-admittance of students following any disciplinary action, period. This will allow the Board of Education to ensure that teachers are held harmless and adequately protected for all offenses committed by students with repeated disciplinary problems, no matter what the source of those problems may be.

Thank you for this opportunity to testify in support of these resolutions.